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No. 99-2047

Supreme Court, U.S.
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In the

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The briefs of Respondents and their allied amici, with all their talk about the importance of Mr. Palazzolo's wetlands, make clear the central point of this litigation: the State of Rhode Island and a certain element of the public very much enjoy the use of Mr. Palazzolo's property, and they would like to continue enjoying it for free. So far, they have succeeded. But what is at stake here is not whether it is in the public interest to protect 18 acres of wetlands in Rhode Island, but whether it is possible, as a practical and theoretical matter, for the putative owner of those wetlands to receive just compensation for his property after it has been seized for public use. Put another way, the question is not whether the public will acquire these wetlands for public purposes, but whether the public will pay for what it has already acquired. Must Mr. Palazzolo alone "bear public burdens which, in all fairness and justice, should be borne by the public as a whole?" *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

I

MR. PALAZZOLO'S REGULATORY TAKINGS CLAIM IS RIPE

A. Respondents' Ripeness Arguments Are Myths

While the public is enjoying the public interest values in Mr. Palazzolo's property, Respondents resort to myths to avoid the merits of his claim for compensation.

1. The "Bait-and-Switch" Myth

The first ripeness-related myth spun by Respondents is that Mr. Palazzolo "failed to apply for the subdivision proposal he claims to have been denied." Brief for Respondents (RB) at 21 (capitalization altered). In this jaundiced view, Mr. Palazzolo "strategic[ally]" applied to the Coastal Resources Management Council (CRMC) to do one thing, but later based his takings claim on something completely different. Not so.

In 1983, Mr. Palazzolo applied to CRMC "to fill approximately 18 acres of salt marsh on the subject property." App. in Pet. for Writ of Cert. (PA) at B-3. CRMC "denied the plaintiff's application and he did not appeal that decision." *Id.* Instead, he sought CRMC approval for an obviously "less ambitious" proposal, namely, "to fill approximately 11.4 acres." Joint Appendix (JA) at 32. Though Respondents accuse Mr. Palazzolo of "deliberately obscuring the reasons why he sought to fill" that acreage, RB at 21, those reasons were perfectly clear. In CRMC's very own words, he sought "to fill a contiguous wetland . . . to establish a private beach club for seasonal use." JA at 25. When CRMC denied the 1985 application as well, Mr. Palazzolo brought the instant action. While his complaint recited the history of his involvement with the property (including dealings with state agencies in the 1960's), *see* JA at 43-44, it pointedly did not even mention the superseded 1983 application to CRMC. Nor did the complaint mention a "plan to fill the entire eighteen acres for an intensive residential subdivision development." RB at 23. Instead, the complaint's factual allegations climaxed with the 1985 application, reciting (in the same words used by CRMC) that Mr. Palazzolo had "proposed to fill a contiguous wetland . . . to establish a beach club for seasonal use only." JA at 44-45, ¶¶ 11-12. Therefore, it was surely the 1985 application that was the "subject of his claim" under the Takings Clause. RB at 23.[1]

Mr. Palazzolo is not trying to "have it both ways." *Id.* at 29. There ***is*** "congruity" between ripeness and the merits: CRMC's denial of Mr. Palazzolo's 1985 application, in conjunction with the agency's more general refusal to allow him to develop his eighteen-plus acres with anything more than one single-family home, was the final decision that makes this

[1] Having had six weeks to dredge the record for any evidence to the contrary, Respondents can produce only a single citation, and that to a passage in which their counsel is grilling a nonlawyer plaintiff about the legal theory of his case. *See* RB at 23 n.33.

case ripe. It is that very refusal that Mr. Palazzolo claims is a compensable taking, and he is still waiting for a court to evaluate that claim under the correct legal standards.

2. The "Additional Lots" Myth

The second ripeness-related myth spun by Respondents is that "[t]he record is not sufficient to support Palazzolo's further contention that [CRMC] would permit 'one single-family home and nothing more.'" RB at 26 (quoting Petitioner's Brief on the Merits at 13). As takings defendants are wont to do, Respondents speculate that "there ***might be*** additional upland portions on Palazzolo's eighteen acres that would support three or four additional lots." *Id.* at 26-27 (emphasis added). But the Court should reject Respondents' cynical, last-gasp attempt to introduce doubt about the "type and intensity of development legally permitted" on Mr. Palazzolo's property. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

First, Respondents' speculation is inconsistent with their failure, in their opposition to the petition, to contradict the petition's statement that permitted development on the property is limited to "one single-family home and nothing more." Petition for Writ of Certiorari at 15. *Cf.* Rule 15.2 (admonishing Respondents' counsel "to point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition" (emphasis added)). Indeed, Respondents affirmatively *agreed with* the petition's statement, stating that a "portion of the site . . . would have been approved by the CRMC as *a single home site*." Memorandum in Opposition to Petition for Writ of Certiorari at 4 (emphasis added). Respondents should not be allowed to change their story now.

Second, if the Court examines the nitty-gritty facts, it will find that Respondents' version is *simply false*. The "evidence" that Mr. Palazzolo could build houses on three or four additional lots consists solely of testimony by two government witnesses. CRMC Director Fugate said nothing more specific

than "there may be" other upland areas on which Mr. Palazzolo could build additional homes. RB at 27 n.40. Engineer Steven Clarke was superficially more helpful to Respondents, testifying on direct examination that " 'the site has two upland areas' " that could be used for homesites and that it "'would be realistic to apply for those locations.' " *Id.*[2]

In evaluating this testimony, however, it is crucial to see exactly *to whom* and *for what* Mr. Clarke thought it was "realistic to apply." The full context of the quoted statement makes it abundantly clear that Mr. Clarke's comment was directed to applying to the *Department of Environmental Management* (not to CRMC) for an *ISDS (septic) variance* (not for a variance from CRMC regulations). *See* Respondents' Appendix (RA) at A-42 to A-43. But was it "realistic to apply" *to CRMC* with respect to the "second" upland location that is the subject of disagreement, which Clarke identified as the "68 through 71, 72 area?" RA at A-44 (referring to the numbered lots on the map at Joint Lodging No. 1 (JL1) Tab 7 at 2). On that point, Mr. Clarke conceded on cross-examination that one "would have to construct a road to get to these lots." TT at 623. He further conceded—and this is what Respondents cynically ignore—that when one "put[s] a road here to get to these lots," one must "*put fill in the coastal wetlands to do so.*" *Id.* (emphasis added). But as the trial court noted, CRMC told Mr. Palazzolo that "*any* proposal involving the filling of wetlands would be denied." PA at B-5 (emphasis added).

For these reasons, Respondents' last-minute speculation that "there might be additional upland portions on Palazzolo's eighteen acres that would support three or four additional lots,"

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[2] The first such site is fill located on the end of a road turnaround and can be seen best in Photo 7, Tab 7, JL1. The second upland site was only casually mentioned at trial as an "island." Testimony of Steven Clarke, Trial Transcript (TT) at 610. It can be seen in Photo 3, Tab 7, JL1, as the hummocky area in the distance.

RB at 26-27, is procedurally improper and substantively false. The Court should reject it outright.

B. The Amici's Ripeness Arguments Are Meritless

1. The "Variance" Argument

Certain amici argue that Mr. Palazzolo needed to seek a "variance" from CRMC's no-fill regulations in order to ripen his claim. But at no time have Respondents, who are presumably in the best position to know, even suggested that a variance could conceivably be granted for the filling of wetlands. It is no surprise why not. Coastal Resources Management Program (CRMP) regulations provide that to grant a variance, CRMC must find that "[t]he proposed alteration conforms with applicable goals and policies in Parts Two and Three [§§ 200-330]." CRMP § 120(A)(1), *reprinted in* Respondents' Lodging at 29. In denying Mr. Palazzolo's 1985 application, however, CRMP explicitly found to the contrary, namely, that "[t]he proposed project is in conflict with" no fewer than five such goals and policies. JA at 27-28 (citing CRMP §§ 210.3(C)(1), 210.3(C)(4), 300.2(B)(1), 300.2(B)(2), and 330(A)(1)). A variance was not an option in this case.

2. The "Unresolved Issues" Argument

The Brief of States of California, et al., as Amici Curiae in Support of Respondents (Brief of Amici States) argues that "a taking claim is not ripe until the landowner establishes"—in a separate litigation—"the boundaries of the property that he proposes to develop and upon which he bases his taking claim." *Id.* at 10. Bracketing the fact that this theory seems to have been created by the California courts, *see id.*, the theory rests on the manifestly erroneous premise that an owner must obtain a final *judicial* decision on various state-law issues to ripen a regulatory takings claim. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) (ripeness is satisfied when "the *administrative agency* has arrived at a final, definitive position

regarding how it will apply the regulations at issue" (emphasis added); *id.* at 193 (by contrast, ripeness does *not* require an owner to resort to "*judicial procedures*" (emphasis added)); *accord Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 737, 739 (1997) (referring to "*Williamson County*'s requirement of a final *agency* position" and to "*agency* action of the sort demanded by *Williamson County*" (emphasis added)).

Moreover, the theory advanced by the Amici States conflicts with the practice of federal courts to treat asserted state-law shields to regulatory takings claims—like the assertion that "the lands that Palazzolo proposed to fill . . . were public trust lands belonging to Rhode Island," Brief of Amici States at 9— as *affirmative defenses* to the takings claim, not as issues that must be resolved in another forum before the claim can even be asserted. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1530 (Fed. Cir. 1996) (en banc) (plurality opinion) (treating the Government's assertion that an easement burdened the plaintiffs' property as one of "the Government's defenses based on the state's property law"); *id.* at 1555 (Clevenger, J., dissenting) (treating the assertion in similar fashion); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1183 (Fed. Cir. 1994) ("[T]he Government had failed to carry its burden of showing that [nuisance] law could have been invoked to prevent the fill."). Any "boundaries" (or "nuisance" or "public trust") issue may be asserted by Respondents on remand as an affirmative defense; those issues do not make the case unripe.

3. The "Not Binding" Argument

The Brief of National Conference of State Legislatures, et al., as *Amici Curiae* in Support of Respondents (Brief of National Conference) urges the Court to hold the case unripe on state-law grounds that the Supreme Court of Rhode Island did not even cite. *See id.* at 5-16. To achieve this result, the brief

argues that this Court's own ripeness rules, particularly the *Williamson County* final decision requirement, "are not binding on the State's courts." *Id.* at 5. This argument fails for three reasons. First, it is irreconcilable with *MacDonald*, which obviously applied the final decision requirement to litigation arising from the *California state courts*. Second, the argument is premised on the idea that *Williamson County*'s other prong (the exhaustion/state procedures requirement) applies to federal takings claims asserted in state courts; however that requirement applies only to takings claims "brought against a state entity *in federal court*." *Suitum*, 520 U.S. at 734 (emphasis added). Third, the argument is intended to justify a regime in which state courts may erect outcome-determinative hurdles to the consideration of federal takings claims beyond those limitations imposed by this Court for federal courts; but such a regime is improper. *See, e.g., Felder v. Casey*, 487 U.S. 131, 141 (1988) (criticizing state-law rules that "will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court," and holding that "[s]tates may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts").

In sum, the gauntlet of additional permitting processes and administrative and judicial proceedings to which Respondents and their amici would subject Mr. Palazzolo perfectly typifies the "piecemeal litigation or otherwise unfair procedures" that this Court rightly condemned in *MacDonald*, 477 U.S. at 350 n.7. This case is ripe, and it is time to reach the merits.

II

SGI'S DISSOLUTION DID NOT RELIEVE THE STATE OF THE OBLIGATION TO PAY FOR PROPERTY NOW ENJOYED BY THE PUBLIC

Nothing in the briefs of Respondents or Amici provides adequate support for the suggestion that this Court should, in

effect, overrule *Nollan*, overrule *Lucas*, and overrule centuries of common law tradition in real property law. But this is what must be done in order to uphold the decision below that the public may enjoy interests in private property that it has not paid for simply because the ownership of that property changes after a regulatory scheme is adopted.

The court below advanced two theories in support of the notion that Mr. Palazzolo's notice of the 1971 regulations in 1978 gives the State the ability to seize the development rights without the payment of compensation. First, the court suggested that the notice, when combined with the transfer of ownership from the corporation to Mr. Palazzolo, changed the underlying title to the property. Second, the court found that notice of the 1971 regulations destroyed Mr. Palazzolo's investment-backed expectations. Both theories are wrong as will be explained below. Interestingly, the State says little to defend these theories. Instead of focusing on the question presented, whether the takings claim is categorically barred whenever a regulation's enactment predates the acquisition, the Respondents suggest simply that the whole panoply of regulations and property doctrines in existence from the beginnings of the State to the present time work upon the "background principles" of property here to obviate any possibility that Mr. Palazzolo, or any of his predecessors, ever had the right to fill. RB at 35-46. Not only is this not an issue before this Court, but it is wrong.

A. Title to This Property Has Always Included the Ability to Fill

Despite the posturing of the Respondents, Mr. Palazzolo's property has always included the right to fill, subject of course—like virtually all development today—to permit approval by the State. While the court below did not address the State's "public trust" arguments, the State continues to suggest that Mr. Palazzolo's rights cannot withstand Rhode Island's changing common law and the public trust doctrine.

See, e.g., RB at 39, 42-46. Amici United States and National Conference of State Legislatures, et al., further suggest that Mr. Palazzolo doesn't actually *own* the portions of the lots that lie below the mean high tide line—another issue not reached by the court below. Brief of United States at 20 n.10, Brief of National Conference at 10. Although this Court ought not and need not reach these unlitigated title issues, the following few paragraphs are provided to dispel any suggestion that Mr. Palazzolo has been asking for something to which he is not entitled. To put it bluntly, Mr. Palazzolo, like all of his predecessors in title, had the right to develop his wetlands.

As stated many years ago by the Rhode Island Supreme Court: "The right to build wharves and to fill out the upland may be exercised, as against anyone but the State provided navigation is not impeded, or a nuisance created thereby.". *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895). And, as more thoroughly explained in a case dealing with the title to tideland (rather than just wetlands) filled for industrial development in Providence on Naragansset Bay:

> In this State it has always been understood that the riparian owner has the right to wharf or embank against his land, and so make land from tide-water, and this without license, provided he does not interfere with the navigation. . . .
>
> The State never undertook to regulate this right till 1815, and then did not profess to grant a right, but only to prevent encroachment to save the harbor . . . .
>
> . . . .
>
> ***The right to wharf out or reclaim is a valuable right even before its exercise. It constitutes a part of the value and sometimes nearly the whole value of the upland.***

Providence Steam-Engine Co. v. Providence and Stonington Steamship Co., 12 R.I. 348, 363-64 (R.I. 1879) (emphasis added) (Potter, J., concurring). *Accord Dawson v. Broome*, 53 A. 151, 157 (R.I. 1902).[3]

Respondents further suggest that the portion of the Rhode Island Constitution, that pertains to preserving the "rights of fishery, and the privileges of the shore" effects a background principle to exempt the State from takings liability, RB at 40, 43-44. However, at one time the full text of the fisheries section of the constitution read:

> "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore to which they have been heretofore entitled under the charter and usages of this State. ***But no new right is intended to be granted, nor any existing right impaired, by this declaration***."

Quoted in Clark v. City of Providence, 15 A. 763, 765 (R.I. 1888) (emphasis added). Thus despite the modern gloss put onto the Rhode Island Constitution, and despite the subsequent elimination of the highlighted language, it is clear that at one time the right to regulate in order to protect the fishery was not seen to be in conflict with existing property rights—including the right to fill.

Nor can Respondents find refuge in the more recent language of the Rhode Island Constitution, article 1, section 16, which purports to exempt the exercise of the powers to "regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of

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[3] This right has been long enjoyed by citizens in Rhode Island. As amici Dr. Teal, et al., point out, "10% of Rhode Island's coastal wetlands greater than 40 acres were filled between 1955 and 1964." Brief of Dr. Teal at 10. Surely it was reasonable for Mr. Palazzolo to expect to develop his property.

the natural environment" from being a "public use of private property." As this Court held in *Lucas*, if "instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.' " *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Moreover, the doctrine of regulatory takings, as applied to *riparian* property owners, has been around in Rhode Island since at least 1871. *See Clark v. Peckham*, 10 R.I. 35, 38 (R.I. 1871) ("[T]his riparian right of access is valuable—is property, and can only be taken on compensation." (citing *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) (right to wharf out can only be taken with "due compensation"))).[4]

Respondents and Amicus United States suggest that Mr. Palazzolo has no right to develop his property because that would be a nuisance. RB at 43, Brief of United States at 19-20, citing to the trial court decision. Of course, the trial court was primarily referring to the water quality issues caused by nitrates from septic systems in the context of Mr. Palazzolo's proposal to fill 18 acres of wetlands (assuming he would build a subdivision), ***not*** his proposal to build a beach club without a septic system. PA at B-10 to B-11. As noted, however, the 1983 application is not the basis of this suit. More importantly, the Rhode Island Supreme Court never reached this issue, and this Court need not decide whether Mr. Palazzolo's background principles are affected by any alleged harm from the 1983

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[4] With respect to suggestions from the brief of Amicus La Plata, Colorado (Brief of La Plata), at 17-18, that the doctrine of regulatory takings is some new-fangled judicial construction, little needs to be said. La Plata is in error. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211.

application. The issue is simply not pertinent to the questions presented to this Court.[5]

In short, while the issues of public trust, title to submerged lands, and nuisance are not before this Court, this Court can rest assured that Mr. Palazzolo's case for the existence of defensible private property rights in his parcel rests on solid ground.

B. Notice of a Regulation Does Not Alter the Title to Property Making It Subject to Uncompensated Enjoyment by the Public

Amicus United States tries to avoid the *stare decisis* impact of this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), that "prior owners must be understood to have transferred their full property rights in conveying the lot" by suggesting that the *Nollan* holding must be confined to physical invasions. *See, e.g.*, Brief of United States at 28-29 n.15. But there is nothing in the logic of *Nollan* that supports a distinction between a taking arising from an unlawful exaction of a public easement and a taking arising from the pressing into public service of 18 acres of wetlands. In fact, this holding in *Nollan* was in response to Justice Brennan's remarks concerning not simply a physical invasion but "investment-backed expectations," and "notice" of the "regulation" of "development permits." 483 U.S. at 857, 859, 860 (Brennan, J., dissenting). The Nollans' rights in their property were the same as the rights held by the

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[5] In any event, the Rhode Island Supreme Court has previously noted:

> At common law the erection of a wharf in tide-waters is ***not indictable as a nuisance*** unless it obstructs navigation. . . . [T]his doctrine has been liberally applied for the benefit of riparian proprietors . . . [who] have been very freely permitted . . . even to make new land by filling the flats in front of their land.

Dawson v. Broome, 53 A. at 155 (emphasis added).

prior owners; so too, Mr. Palazzolo's rights in his property are the same as the rights that were held by Shore Gardens. More importantly, the logic of the *Nollan* rule that notice of a regulation does not destroy a purchaser's right to property should be ***stronger*** for instances of regulatory takings. Landowners are much more likely to be aware of the existence and implications of a physical invasion than of a regulatory taking—especially when the existence of a regulatory taking can never be confirmed until the regulation is applied. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (The mere existence of a regulatory permitting requirement does not, in and of itself, constitute a taking.).[6]

Respondents and Amici conflate the "background principles" language of *Lucas* with the full extent of the State's police power—wherein everything from the Royal Charter of 1663 to the Clean Water Act of 1972 fall under the rubric of " 'existing rules or understandings.' " *See Lucas*, 505 U.S. at 1030. *See, e.g.*, RB at 44 (1663 Charter), Brief of United States at 20 n.10 (Clean Water Act). But this Court was far more precise in *Lucas*, stating: "The use of these properties for what are now expressly prohibited purposes was ***always*** unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." 505 U.S. at 1030 (emphasis in original). While a landowner may expect there to be certain restrictions or permitting requirements, a landowner certainly does not expect that government may take away the economically viable use of valuable property without paying just compensation. *See, e.g.*, *Preseault*, 100 F.3d at 1540 (noting that "a taking of a recognized property interest, invokes a general expectation of

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[6] The suggestion by the United States that Mr. Palazzolo is arguing for an "assignment" of a constitutional claim is unfounded. Brief of United States at 28-29. There was no "constitutional claim" until the regulation was ***applied***, an event which did not occur until 1986.

compensation"). Property owners must face the obvious fact of life that the use of property often involves regulatory constraints and that such restraints may be modified in the future. But that does not mean that newly adopted regulatory restraints somehow affect the very title of the property itself. If that were so, then title to property would be infinitely malleable by legislative fiat. As this Court further said in *Lucas*: "When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Lucas*, 505 U.S. at 1030.

In this case, the requirement that all uses of coastal wetlands in Rhode Island meet some "compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests" is most certainly a newly decreed requirement, having been decreed by the CRMC regulations only a few years before Mr. Palazollo acquired the property that is now being enjoyed by the public.

The notion that the state can relentlessly reduce through regulatory redefinition background rights in property is contrary to our traditional understanding that while property may be created by government, it cannot be taken back without compensation. As the Ninth Circuit recently wrote,

> "there is, we think, a 'core' notion of constitutionally protected property," and a state's power to alter it by legislation "operates as a one-way ratchet of sorts," allowing the states to create new property rights but not to encroach on traditional property rights. . . . "[W]ere the rule otherwise, States could unilaterally dictate the content of—indeed altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts."

Washington Legal Foundation v. Legal Foundation of Washington, No. 98-35154, 2001 U.S. App. LEXIS 314 (9th Cir. Jan. 10, 2001) (citations and footnotes omitted). *Accord West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532 (1848) (state must respect property rights it invests in its citizens). *See also Gulf Power Co. v. United States*, 187 F.3d 1324, 1330 (11th Cir. 1999) ("[T]he fact a utility gained its property knowing it would be subject to extensive regulation for the public use does not means [sic] its property may be taken for a public purpose without payment of just compensation, however laudable that public purpose might be."); *Preseault*, 100 F.3d at 1540 (rejecting "the proposition that an owner's property rights are defined by what the owner might (should?) have believed the law to be at the time she acquired her property, and that that belief makes it so").

If the State's theory of property were to be accepted, then the principle that property is a fundamental right that may be regulated but not defined by legislative action would have to succumb to the positivist notion that all property, and concomitantly all rights, are a result of state beneficence. But this Court has too often noted the "interdependence" between liberty and property for one to be particularly sanguine about the prospect of a legal system that would allow legislative action to be the ultimate arbiter of what is and what is not property. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Indeed, more recent scholarship makes a compelling case for the theory that the rise of individual and political liberties in western Europe in general, and in England in particular, was inextricably tied to the developing understanding that property is a fundamental right that is not dependent upon the pleasure of the sovereign. *See* Richard Pipes, *Property and Freedom* 121-58 (1999). If the sovereign could seize private property for whatever purpose, noble or otherwise, without making some fair recompense to the owner—then the development of western concepts of liberty

would have been dramatically curtailed, at best. *Id.* at 159-208 (discussing the inhibition on the development of personal and political freedoms in Russia, where princes, czars, and dictators could, and did, seize property with impunity). In short, the implications from the State's "title theory," wherein notice of a regulation undermines the preexisting title in property, such that the State can effect an uncompensated seizure of interests in private property, are disturbing and without foundation in American jurisprudence and its essential understandings of liberty.

C. Notice of a Regulation Does Not Destroy Investment-Backed Expectations Such That the Public Can Enjoy the Regulated Property Without Paying Just Compensation

Respondents and allied amici insist that because Mr. Palazzolo acquired his land in 1978, after the CRMC regulations were adopted, he had no "investment-backed expectations" in developing his property. *See, e.g.*, RB at 48.

As a preliminary matter, it should be asked who was on notice of what? Certainly landowners like Mr. Palazzolo in Rhode Island were on notice not only of the permitting requirements affecting the filling of property, but also of the centuries of tradition wherein landowners freely reclaimed tidelands. *See, e.g., Providence Steam-Engine Co.*, 12 R.I. at 363-64. But he was ***not*** on notice that there was an outright ban on all filling of wetlands for residential or private recreational development. He was ***not*** on notice that the public would forevermore enjoy the benefits of his property in its undeveloped state without payment. *Preseault*, 100 F.3d at 1540 (there is an expectation ***to be*** compensated). Likewise, the State was on notice that a regulation that goes "too far" is a taking and that, under the Constitution, "compensation must be paid" when economically beneficial use is denied. *Lucas*, 505 U.S. at 1030.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), a landowner's "distinct investment-backed expectation" was listed as a factor to consider in determining whether liability attaches for a regulatory taking. It should be quite clear that notice of a regulatory scheme does not destroy all expectations of obtaining a permit. One need look no further than *Penn Central* itself, where one of the appellants, Union General Properties (UGP), acquired its leasehold interest in the Penn Central property ***after*** it was designated as a landmark. *Id.* at 116. Despite the fact that UGP was on "notice," that fact was not dispositive.

Whether it be a taking from a physical invasion or the application of a regulation, there is no logical reason why the existence of a regulatory scheme should put landowners on "notice" that they have no "investment-backed expectations" to utilize their property in an economically beneficial manner:

> The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Riverside Bayview, 474 U.S. at 127. Not until 1986, after a string of permit denials based upon, among other things, a "compelling public interest" policy against residential

dwellings, could Mr. Palazzolo have known that his property was no longer his.[7]

It should suffice to say that whatever effect the existence of the CRMC regulations may have had on Mr. Palazzolo's investment-backed expectations in 1978, that effect is not particularly relevant to the question of the State's liability for a regulatory taking. In short, Mr. Palazzolo's expectations most assuredly did not include an expectation that the public would wind up enjoying the benefits of his 18 acres without payment.

III

ECONOMIC VIABILITY IS NOT THE SAME AS ECONOMIC TOKENISM

The third question presented to this Court is whether "the remaining permissible uses of the property are *economically viable* merely because the property retains a value greater than zero." The State protests that the ability to utilize a small portion of the property as a homesite obviates whatever harm has been suffered over all the rest of the property. RB at 29-31. Respondents further claim that there can be no taking because the total value of Mr. Palazzolo's "investment " was $13,000, based on acquisitions in 1959 and 1969. RB at 30.

Surely, the State is trying to have it both ways. If Mr. Palazzolo did not acquire the property until 1978, then

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[7] A more appropriate role for expectations is a determination of the amount of ***compensation*** rather than a determination of the underlying ***liability***. *See* R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. State Clarify the Supreme Court's Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Env. L. J. (forthcoming Apr. 2001) (noting that the judicial inquiry into a landowner's investment-backed expectation is necessarily fact-driven and is properly concerned with determining the appropriate level of compensation, not with establishing takings liability).

SGI's purchase price has no relevance to this case. Besides, whether one pays too much, too little, inherits, or wins property in a game of chance, the government's liability should depend only on what has truly been taken—in this case the use of 18 acres. The more crucial inquiry, and the one presented to this Court, is whether the potential use of a tiny bit of upland obviates the destruction of the use of 18 acres of wetland. Respondents are essentially asking for a categorical rule that whenever any use remains in any portion of a property, there can be no taking. This Court should reject such a rule. Economic viability must mean more than economic tokenism. A proper analysis (not attempted by the court below) of the potential uses of the property in 1978 and its value at that time—as compared to its potential uses and value after 1986—could help guide a court to determining whether the property is truly economically viable. But the facile notion that any use, no matter how truncated, is economically viable cannot be maintained.

Amicus County of La Plata suggests that to allow a landowner to receive compensation when a token use remains would encourage strategic behavior by landowners. Brief of La Plata at 16; *see* PA at A-16 ("pernicious" claims). Under this logic, the state can freely seize 1000 acres, so long as the owner owns 1001. Since the Takings Clause is not an engine of redistribution, it would be better to find a formulation that compensates landowners whenever a significant portion of property has been taken for public use.[8]

Mr. Palazzolo, of course is not asking for a guarantee of a "positive return on his investment." Brief of United States at 22-23 n.12. Rather, what is at stake here is whether there is a denial of economically viable use as contemplated by *Agins v.*

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[8] For a defensible test, and one that avoids paying compensation for mere setbacks, *see* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994).

City of Tiburon, 447 U.S. 255 (1980), and *Lucas* when there is a combination of: (1) a denial of all use of 18 acres, (2) the public's enjoyment of that property, and (3) the tremendous economic loss in value manifested by a negative return on the value of the property in 1978. As this Court noted in *Penn Central*, a taking was not found there in part because the owners had the "present ability to use the Terminal ***for its intended purposes and in a gainful fashion***." 438 U.S. at 138 n.36 (emphasis added). It can hardly be considered "gainful" to take a highly valuable property, allegedly worth $3.1 million (based on comparable sales), and reduce it to a potential of a mere $200,000.

CONCLUSION

In 1986, and not before, the State of Rhode Island removed all doubt about whether Mr. Palazzolo could put any of his wetlands to private economic use. The loss has been so severe that he has not enjoyed any "reciprocity of advantage" and has not received any "givings" from the regulation of what were once his wetlands. He has suffered a wipeout that is not erased by the remnant value of a single putative homesite. Because the public is enjoying all the benefits of his wetlands, the public should pay for it.

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Respectfully submitted,

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